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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Lisa Chandler Cordell

December 3, 1999

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

RE: CC Docket No. 99-301
Motion to Bifurcate the Docket and Comments of the American Cable Association

Dear Ms. Salas:

On behalf of the American Cable Association ("Association"), we enclose the Association's **Motion to Bifurcate the Docket and Comments** in the above-referenced docket. We request that each Commissioner receive a personal copy of these materials.

Please call with any questions.

Very truly yours,



Lisa Chandler Cordell

Enclosures

cc: American Cable Association

cc (via FedEx): Tom Power, Senior Legal Advisor to Chairman Kennard
Helgi Walker, Senior Legal Advisor to Commissioner Furchtgott-Roth
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**Before the
Federal Communications Commission
Washington, D.C. 20554**

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DEC 3 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

**Local Competition and Broadband
Reporting**

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CC Docket No. 99-301

To: The Commission

**MOTION TO BIFURCATE THE DOCKET
AND
COMMENTS OF THE AMERICAN CABLE ASSOCIATION**

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December 3, 1999

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SUMMARY

Monitoring the progress of the broadband market remains an important Commission function. The Commission's Notice of Proposed Rulemaking ("NPRM"), however, raises some concerns over the process of establishing the reporting requirements and over the requirements themselves.

To provide the greatest value, this information-gathering effort will require direct participation by several Commission offices. The Cable Services Bureau, in particular, should lend its expertise relating to cable broadband matters. The Commission should therefore grant the Association's Motion and require the Cable Services Bureau to have a direct role, both in the rulemaking proceeding itself and the oversight of data collection and assessment.

The Commission must adopt reporting requirements that accommodate the differences between the various providers of "broadband" services. In addition, any reporting obligation must seek to minimize the administrative burdens posed on smaller cable systems that provide broadband services. To that end, the Commission should:

- Impose mandatory reporting obligations only on cable television system operators with 2,500 or more broadband subscribers nationwide and allow smaller entities to file voluntarily.
- Require reporting entities to file reports no more frequently than semi-annually.
- Require reporting entities to report data on a state-by-state basis and to provide specific information relative to broadband deployment in rural areas.
- Tailor the survey to more appropriately measure cable broadband activity.

These changes will permit the Commission to closely monitor broadband deployment while

minimizing the administrative burdens associated with reporting obligations.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

**Local Competition and Broadband
Reporting**

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CC Docket No. 99-301

To: The Commission

**MOTION TO BIFURCATE THE DOCKET
AND
COMMENTS OF THE AMERICAN CABLE ASSOCIATION**

I. INTRODUCTION

The American Cable Association ("Association") files this Motion to Bifurcate the Docket and Comments ("Motion and Comments") to address important issues raised in the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. The Association lends strong support to the Commission's initiative to collect data regarding broadband deployment; however, the NPRM raises critical concerns. The Association has serious concerns regarding both the form and substance of the reporting obligations and the mechanism adopted for imposing those obligations. To the extent the Commission, through its various Bureaus, seeks to gather information regarding broadband activities of cable systems, it remains imperative that the expert body — the Cable Services Bureau — participate in that activity. For these reasons, the Association files this Motion and Comments.

II. BACKGROUND

The American Cable Association files this Motion and Comments on behalf of its nearly 300 member independent cable businesses and their smaller cable systems that serve more than 2.3 million subscribers nationwide. The majority of the Association's members have fewer than 1,000 total subscribers. Formerly known as the Small Cable Business Association, smaller, independent cable businesses formed the Association in 1993 to represent the collective interests of its members and to speak with a unified voice regarding issues affecting their businesses. The Association regularly represents its members' interests in Commission proceedings to inform the Commission of characteristics and concerns of smaller and independently owned cable businesses and to ensure that Commission decisions do not unfairly and adversely impact the Association's members' businesses.

Many Association members have aggressively sought to deploy advanced services, often in rural and high-cost areas. Despite their smaller capital budgets, difficulty in gaining access to capital, low-density, often rural or insular, service areas, and resulting higher per-subscriber costs, the Association's members have sought, and continue to seek innovative solutions to providing advanced services to their subscribers. Notwithstanding these limitations, the Association's members have begun to meet this challenge with growing success.

III. MOTION TO BIFURCATE THE DOCKET

The Association seeks for Commission establishment of a coordinated docket number and proceeding to ensure that the Cable Services Bureau shares responsibility in

this proceeding and oversight of any data collection and assessment that should result. To the extent the Commission seeks to impose reporting obligations on cable television systems regarding their advanced-services deployment activities, it remains critically important that the Commission appreciate the distinctions between advanced services offered by cable systems and those offered by other service providers. This compels the need for direct coordination among the Commission's various bureaus.

The Commission must collect meaningful data regarding broadband deployment. At the same time, it must craft reporting obligations that accommodate the differences among various communication technologies. As drafted, the Commission's proposed reporting obligations do not fully accomplish this. The NPRM acknowledges that the different technologies providing broadband services may not fit within the parameters of the proposed questions and seeks comments on this point; however, the proposed questions generally retain a strong common carrier orientation.¹ Although comments of different communications providers may provide insight into the technology and infrastructure employed by their particular services to offer broadband services, distilling that input into meaningful yet readily adaptable data collection methodologies requires the expertise of various Commission offices. Once collected, analysis and synthesis of the data will also require involvement by the different Commission offices.

¹ See *In the Matter of Local Competition and Broadband Reporting*, Notice of Proposed Rulemaking in CC Docket No. 99-301, FCC 99-283 (released October 22, 1999) ("NPRM") at ¶¶ 68-69.

The Cable Services Bureau serves as the expert on cable-related matters. It regularly works with cable providers and has the best understanding of their technology and infrastructure. Cable's infrastructure differs from that of telecommunications providers, and other advanced service providers. Direct participation by the Cable Services Bureau in this proceeding remains critically important to ensure that (1) the information sought correlates to the broadband measurements and standards used by cable businesses and (2) that the information translates into meaningful data. The Association therefore respectfully requests that the Commission grant its Motion and direct the Cable Services Bureau to directly participate in a coordinated parallel proceeding and share oversight responsibility for data collection and analysis.

IV. SMALLER CABLE SYSTEMS ARE AGGRESSIVELY DEPLOYING ADVANCED SERVICES.

Smaller, independent cable entrepreneurs, many spurred by the deregulation provided in the 1984 Cable Act, built cable systems in places where no one else would -- not even the local telephone provider. These small businesses and individuals accepted the risk of building in high-cost and lower-income areas as well as the lower rates of return that service to rural America often dictates. Most built successful businesses serving rural America. Most of these smaller cable businesses have continued to invest in their communities over the years. Today, many provide or are about to launch new digital services, often including high-speed digital, data and Internet services in rural America. The marketplace for these smaller cable businesses works. Even in the face of vigorous

competition in their core businesses from DBS, smaller cable continues to invest in rural America.

Smaller cable businesses have and continue to make tremendous strides in bringing advanced services to rural America. Through true entrepreneurial spirit, these businesses have sought and found creative solutions to build the infrastructure needed to provide advanced services. The American Cable Association estimates that almost half of its member businesses have already deployed at least one type of high-speed broadband services in rural communities. Many more have plans underway to launch similar services. It, however, remains a challenge, to provide these high-cost infrastructure investments in smaller and smaller communities.

V. THE ASSOCIATION GENERALLY SUPPORTS DATA COLLECTION REGARDING BROADBAND ACTIVITIES.

The Association generally supports the Commission's initiative to collect data regarding communication providers' broadband efforts. That said, the Association has serious concerns regarding specific proposals outlined in the NPRM. The Association provides these Comments to assist the Commission in formulating meaningful standards for data collection regarding broadband deployment.

A. Definitional Issues.

As the Commission has previously found, "[n]umerous companies in virtually all segments of the communications industry are starting to deploy, or plan to deploy in the near future, broadband to the consumer market. Current providers include cable television

companies, incumbent LECs, some utilities, and 'wireless cable' companies."² To the extent the Commission seeks to gather information from these various communications entities that employ different technologies to provide advanced services, it remains imperative that the Commission fashion a universally-applicable basis for comparing and analyzing infrastructure and services. This requires formulating generally-applicable definitions.

What is "rural"?

The Commission seeks to ensure that it collects data regarding broadband deployment in rural communities but asks how best to accomplish this task.³ The Association recommends adopting the definition of "rural" used for the rural exemption from the telephone company-cable cross-ownership prohibition. In that context, the Commission has adopted the rural definition used by the Census Bureau⁴ that defines "rural" as all areas outside of:

- (a) places of 2,500 inhabitants or more, incorporated or unincorporated; and

² See *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Responsible and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report in CC Docket No. 98-146, FCC 99-5 (released Feb. 2, 1999) at ¶ 12 ("Advanced Telecommunications Report").

³ See *NPRM* at ¶ 70.

⁴ See *In the Matter of Elimination of the Telephone Company - Cable Television Cross-Ownership Rules, Sections 63.54-63.56, for Rural Areas*, 88 F.C.C. 2d 564, 575 (1981) ("Telco-Cable Cross-Ownership Rural Exemption Order"), *recon. denied*, 91 F.C.C. 2d 622 (1982), *aff'd sub. nom.*, *National Cable Television Association, Inc. v. FCC*, 747 F.2d 1503 (D.C. Cir. 1984).

(b) other territory, incorporated or unincorporated, included in urbanized areas.

As with the telco-cable cross-ownership rural exemption, the Commission should employ only the "most recent U.S. Census Bureau statistics."⁵

This definition will prove to be the easiest means to define rural areas. As the Commission found in its *Telco-Cable Cross-Ownership Rural Exemption Order*, "the status of the area as rural must be readily apparent. Unfortunately, household density is not readily apparent. It requires engineering studies and surveying techniques. Even then, the results are not irrefutable."⁶ The relative simplicity of using the Census Bureau definition makes it more practical than other "rural" definitions.⁷

Employing this standard has other significant benefits. Because it is not technology-based, the Commission can universally apply this standard to all broadband providers. This will permit the Commission to monitor broadband deployment progress with greater ease. Moreover, by using the most recent Census Bureau statistics, the Commission can gain a more accurate picture of the changing landscape.

⁵ See *Telco-Cable Cross-Ownership Rural Exemption Order* at 575.

⁶ See *id.* at ¶ 32.

⁷ See, e.g., 47 C.F.R. § 76.5(jj) (defining "rural" as a function of the number of households per plant mile).

B. The Commission Must Refine Mandatory Filing Thresholds.

1. Filing obligation only on cable businesses serving more than 2,500 broadband data customers.

The Commission should increase its proposed mandatory filing threshold to those businesses with more than 2,500 broadband data customers nationwide. While the Association appreciates the Commission's concern that it "do[es] not miss broadband developments by smaller entities, for example, in rural areas,"⁸ the Commission must also weigh that concern against the administrative burdens that mandatory filing will place on smaller cable broadband providers.⁹ The Commission's proposed threshold of 1,000 customers nationwide fails to consider those burdens; the Association therefore suggests a 2,500 nationwide broadband data customer threshold as a better alternative.¹⁰

System size alone does not limit the administrative burdens associated with any reporting obligation. Many cable businesses have small systems scattered throughout the country. Even those systems, while perhaps exceeding 1,000 broadband customers, would need to incur significant financial and personnel costs to analyze and prepare semi-annual reports on a state-by-state basis. While the Association strongly encourages the

⁸ See *NPRM* at ¶ 40.

⁹ See, e.g., *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration in MM Docket Nos. 92-266 and 93-215, 10 FCC Rcd 7393 (1995) ("*Small System Order*") (discussing the need for small system administrative relief).

¹⁰ Assuming 5% high-speed broadband data penetration, this equates to a 50,000 customer cable company, still well below the other thresholds established by federal law.

Commission to boost the filing threshold to 2,500 broadband data customers nationwide, it will encourage its smaller members to voluntarily file reports.

2. The Commission should not continue to avoid classification of cable broadband services as either "telecommunications services," "cable services," or something else.

The NPRM makes clear that it will not decide "whether broadband service provided over cable television systems is "telecommunications."¹¹ The Commission states that

[s]ome broadband facilities and services may not be 'telecommunications' within the precise terms of the Communications Act of 1934, as amended, but may as a practical matter be competitive with broadband telecommunications. One such service is broadband provided over cable television systems. We do not decide whether cable-based broadband is 'telecommunications,' but we include it within the scope of our questions because it competes directly with services that are telecommunications.¹²

While this proceeding does not serve as the appropriate forum to resolve this debate, the time has come for the Commission to issue a Notice of Inquiry into this matter.

The Association has previously cautioned against hasty classification of cable broadband services as either "telecommunications services" or "cable services."¹³ The pending decision in the *Portland* case, however, may decide this issue and deny the Commission the opportunity to lend its expertise in this area. Commission involvement

¹¹ See NPRM at note 64.

¹² NPRM at ¶ 33.

¹³ See *In the Petition of Internet Ventures, Inc. et al. For Declaratory Ruling that Internet Service Providers are Entitled to Leased Access to Cable Facilities Under Section 612 of the Communications Act of 1934, as Amended*, Reply Comments of the American Cable Association in CSR-5407-L (filed August 11, 1999) at 4 ("*IVI Reply Comments*").

with regard to classifying cable broadband services as telecommunications services, cable services or even some other, yet to be defined, service, remains critical.¹⁴ For this reason, the Association strongly recommends that the Commission initiate a proceeding to gather more information regarding these issues.

The bevy of litigation surrounding the cable broadband classification issue is forcing the Commission to act. Courts, unlike the Commission, do not have the expertise or authority to fashion a new classification. Without an alternative, courts may feel compelled to apply traditional models -- telecommunications services or cable services. Either classification can have far-reaching legal and regulatory consequences, effectively imposing regulation on the Internet, which the Commission has sought to avoid.¹⁵ The Commission, however, can best analyze this situation and make a determination. A Commission inquiry will provide the Commission an opportunity to occupy the field

¹⁴ The Association has similarly cautioned against applying traditional regulatory models to emerging services. See *IVI Reply Comments* at 4. This means that the ultimate classification of cable broadband services may not be either "telecommunications services" or "cable services."

¹⁵ See, e.g., Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy*, OPP Working Paper No. 29 (March 1997); see also Jason Oxman, *The FCC and the Unregulation of the Internet*, OPP Working Paper No. 31 (July 1999) at 21 ("The FCC policy [that the market, not the government, should bring broadband to all Americans] has important implications for ongoing deployment of cable modems. A deregulatory approach to cable modem deployment is aimed at permitting this nascent market to flourish without governmental interference. Rather than risk hindering cable Internet service deployment in its early stages by imposing a potentially inappropriate regulatory model, the Commission has determined that the marketplace should address early deployment issues while the FCC monitors the ongoing deployment closely.").

involving this matter and, more importantly, a chance to officially declare that it is instituting a federal policy to leave these services unregulated.

The Association does not advocate that the Commission use such a proceeding to signal its intention to regulate cable broadband services or the Internet in general. To the contrary, the Association suspects that the most appropriate classification may be one that federal law has not yet defined, leaving the door open for the Commission to state its policy to leave, at least for now, these matters unregulated.

C. The Commission Must Balance the Frequency of Reports with the Associated Administrative Burdens.

Any filing obligation should occur on no more than a semi-annual basis. While the Association generally agrees that routine reporting will help establish a more accurate record of broadband developments, the Commission must weigh that need against the administrative burdens imposed on smaller providers of broadband services.

The Commission has previously recognized the importance of minimizing smaller cable businesses' administrative burdens associated with regulatory obligations.¹⁶ This consideration must extend to any reporting obligation tied to smaller cable businesses' non-cable offerings. Balancing the need to monitor progress against the administrative burdens associated with any reporting obligation, the Commission must not require filing of reports any more frequently than semi-annually.

Semi-annual reports will not hinder the Commission's ability to establish an accurate picture regarding broadband deployment. Semi-annual reports will permit the Commission

¹⁶ See *Small System Order* at ¶ 26.

to build an accurate picture of these efforts without imposing further costs on smaller cable operators, savings that smaller cable operators can better spend toward launching new customer services.

D. The Commission Should Collect Data on a State-by-State Basis With Specific Information Regarding Rural Areas.

The Association agrees that "[f]or information to be useful, it must be reported on a geographically coherent and consistent basis by all entities submitting data."¹⁷ The Association supports gathering information on a state-by-state basis. This will provide a uniform basis for monitoring progress but minimize the administrative burdens associated with compliance.

The Association suggests one refinement to any reporting obligation. To ensure that the Commission can monitor progress in rural areas, the Commission should ask reporting entities to identify any rural areas, as defined above, served.

E. The Commission Must Tailor Cable's Reporting Obligations.

The Commission's proposed questions relating to broadband deployment do not adequately reflect how cable measures its broadband efforts. Cable, unlike other broadband providers, does not use dedicated lines to provide broadband services.¹⁸ Consequently, questions such as the number of lines have no relevancy for cable broadband purposes. Further, owned versus resold facilities is similarly meaningless in the cable context.

¹⁷ See *NPRM* at ¶ 45.

¹⁸ See *Advanced Telecommunications Report* at Appendix A, Item 6.

The Association suggests that the Commission modify its report to create a separate subsection for Sections IV and V that specifically relates to cable broadband efforts. The specific information the Commission should seek includes:

- Total number of high-speed broadband data customers:_____
- Average number of homes (including individual dwelling units in multiple unit buildings) passed by each node:
 - ☐ None - not a fiber optic system
 - ☐ Fewer than 500
 - ☐ 500-1,000
 - ☐ 1,000-1,500
 - ☐ 1,500+
- Average number of customers per node:_____
- Average capital costs per-subscriber:_____
- Two-way self-contained system or downstream only:_____
- If downstream only service, what mode of upstream service is used?:_____
- Downstream speed:_____
- Upstream speed:_____
- List any rural areas served:_____

The Commission can ask cable broadband providers to distinguish between one-way and two-way broadband communications.¹⁹ Similarly, the Commission can have cable broadband providers breakdown this information relative to all customers and residential customers. This format will help the Commission monitor the progress of broadband

¹⁹ Some broadband systems use the broadband facility for downloading data, but use telephone lines for the return paths.

deployment generally, and cable broadband deployment specifically, without compromising the integrity of the information collected from cable broadband providers.

VI. CONCLUSION

Monitoring the progress of the broadband market remains an important Commission function. To provide the greatest value, however, this effort will require direct participation by several Commission offices. It further requires a meaningful data accumulation and analysis vehicle that provides for input by different technologies and industry segments. The Association therefore respectfully requests that the Commission incorporate the proposals the Association makes in this Motion and Comments.

Respectfully submitted,

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